

BEFORE THE NINTH CIRCUIT COURT OF APPEALS

UNITED STATES OF AMERICA,

Plaintiff,

vs.

CASE NO. 12-PO-0001

DAVID DUANE EVERIST,

MEDFORD, OREGON

AUGUST 22, 2012

Defendant.

_____/

TRANSCRIPT OF PROCEEDINGS - MOTION TO DISMISS

BEFORE THE HONORABLE JUDGE MARK D. CLARKE

UNITED STATES DISTRICT COURT MAGISTRATE JUDGE

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1 MEDFORD, OREGON - WEDNESDAY, AUGUST 22, 2012 - 10:03 A.M.

2 ///

3 THE COURT: Good morning to everyone. Good
4 morning, Mr. Everist.

5 THE DEFENDANT: Good morning.

6 THE COURT: I have read all the papers you
7 submitted, including the Government's supplemental
8 authority. I think it -- that was just filed here
9 recently. But I certainly welcome any comments or
10 arguments you want to make, Mr. Butler.

11 MR. BUTLER: Thank you, Judge. I appreciate you
12 having read those things carefully, and I won't -- I will
13 try to not go on too long and just kind of summarize what
14 we have already said.

15 I did see the Government's supplemental response
16 yesterday. Certainly we are aware of that case;
17 Mr. Everist was the Defendant in that case. The basis for
18 one of the motions to continue that case came down, and we
19 needed to make sure we crafted our argument accordingly.
20 I read that case again this morning. It's not real clear
21 what argument Mr. Backlund and Mr. Everist made in that
22 case. The Court of Appeals just said -- well, they say
23 the CFRs don't apply and, further, that it was vague on
24 due process grounds. And then they do go through several
25 pages of describing the statutory background.

1 I think we have raised argument not raised in
2 that case. There's a mention that either Mr. Backlund or
3 Mr. Everist may have argued that any residency on a mining
4 claim is always incident to mining. That is not an
5 argument that we have made in this case so -- but we
6 accept that certainly in the Ninth Circuit case they did
7 assume that these laws apply to miners. I think we have
8 raised new issues in this case.

9 Just as a way of background -- I know we have
10 already raised this. Sort of the starting point in this
11 case is the mining law of 1872 which recognizes property
12 rights in valid mining claims whether they are patented or
13 unpatented mining claims. And the policy behind that Act
14 was to encourage exploration of the West, to encourage
15 people to go and seek minerals. And I don't think there's
16 any dispute between us about whether those rights were
17 created. In the Government's memorandum Mr. Fong notes
18 that there's language in there about United States
19 regulations prescribed by law. And let me be clear: We
20 are not saying that no regulation could ever be made to
21 regulate mining activities. We are saying rather that
22 these specific regulations don't apply. So whether or not
23 any regulations could happen is not a matter of dispute
24 before the Court at this point.

25 The organic Act of 1897 set aside certain public

1 land for public use as forest reserves. The Act
2 specifically allowed persons to enter the national forest
3 for lawful purposes and those purposes include mining
4 activities. The Act also says that where mineral lands
5 have been shown to be better adopted for purposes like
6 mining, that land may be restored to the public domain.
7 So the land is better suited for mining it ceases to be
8 part of the national forest land. Upon location of a
9 mining claim, the land is no longer set aside within the
10 meaning of the organic act and no longer subject to
11 regulations. And Forest Service regulations certainly
12 cannot change a statute; they have to be properly
13 promulgated under authority by Congress.

14 The other important statute here is the Federal
15 Land Policy Management Act, sometimes known as FLPMA, of
16 1976. That law recognized that no provision of that Act
17 shall in any way amend the mining law of 1872 or impair
18 the right of any locators or claims under the Act with
19 some limited exceptions. One of the those exceptions
20 authorized the Secretary of the Interior to determine
21 whether mining operations resulted in unnecessary or undue
22 degradation of public land. This case is by the Forest
23 Service under the Department of Agriculture, not the
24 Department of Interior.

25 THE COURT: The Government also refers to an act

1 of 1955 in their papers.

2 MR. BUTLER: Yes. I will take a minute to
3 respond to their argument.

4 THE COURT: Okay.

5 MR. BUTLER: Our first argument is that the
6 federal regulations regarding public land don't apply to
7 Mr. Everist's valid mining claim. The mining laws in
8 FLPMA only apply to public lands that are subject to sale
9 or other disposal under general laws, excluding those to
10 which any claims or rights to others have been attached.
11 That language is from Humboldt County versus United States
12 which I have cited in the material.

13 A valid mining claim, as I have said, is a
14 vested private property right in the locator; in this
15 case, Mr. Everist. Once that claim -- unless the claim is
16 deemed invalid, the land is no longer subject to sale or
17 disposal by the Forest Service so a valid mining claim is
18 no longer a public land within the meaning of FLPMA. And
19 FLPMA by its own terms does not apply to any property
20 interest recognized by the mining laws. So if there's
21 a -- if there's a valid mining claim there's no valid
22 federal jurisdiction under FLPMA.

23 Again, it doesn't matter that the Mining Act of
24 1872 contemplates certain regulations. What matters is
25 there's a statute that allows the Forest Service to

1 promulgate these regulations.

2 Secondly, even assuming that Mr. Everist is
3 subject to federal regulation limiting his use to mining
4 operations and use reasonably incident thereto, the Forest
5 Service hasn't been given any authority to promulgate
6 regulations to determine what operations are reasonably
7 incident to mining. FLPMA gives the Department of
8 Agriculture the authority to promulgate regulations under
9 FLPMA. It does not give them the authority to regulate
10 mining claims it authorizes. Rather, Department of
11 Interior, not Department of Agriculture, to promulgate
12 regulations under the mining law. The Forest Service is
13 an agency within the Department of Agriculture; the
14 Department of Interior has other agencies.

15 Our argument is that the Forest Service lacks
16 any statutory authority to come up with regulations to
17 decide what uses are reasonably incident to mining. The
18 36 CFR 261, which is at issue in this case, is promulgated
19 under the authority of Section 551, 16 USC 551, which
20 enables the Secretary of the Department of Agriculture to
21 promulgate regulations for lands that have been set aside.

22 As I said earlier, these lands have been set
23 aside because Mr. Everist has a valid mining claim. That
24 creates a property interest and no subsequent act,
25 including the Multiple Use Act mentioned by the Government

1 or FLPMA changes that or gives the Forest Service specific
2 authority over these regulations.

3 Just in trying to address couple of the
4 Government's arguments, the first argument I think by the
5 Government is that since the 1872 Mining Act
6 contemplates -- says that mineral deposits alone are open
7 to exploration and purchase. That means that Mr. Everist
8 is wrong about asserting a property interest in his claim.
9 I think that's just wrong. We haven't argued that no
10 regulation could apply but clearly recognizes property
11 rights. That's just a fact the Government has to deal
12 with. The question is whether there are valid regulations
13 that limit that property right.

14 Then, I guess, the second argument as I
15 understood it by the Government is that Section 551
16 authorized the regulations. What I didn't see addressed
17 was that 38 CFR 228.1. Says that those regulations do not
18 apply to management of mineral resources. The management
19 of mineral resources is left to the Secretary of Interior,
20 not the Secretary of Agriculture. The Government says
21 well, Mr. Everist's use did cause a surface disturbance;
22 therefore, they have authority. But the question is not
23 whether in this case Mr. Everist's use caused a surface
24 disturbance but whether or not they had the authority to
25 promulgate regulations relative to that. He's not charged

1 with a surface disturbance; he's charged with occupying
2 forest land and other things. So the question isn't
3 whether or not in this case there's a surface disturbance
4 but whether they had the authority to promulgate the
5 regulations to begin with.

6 THE COURT: Thank you. Mr. Fong.

7 MR. FONG: Thank you, Judge. Judge, I think
8 that all the answers to Mr. Everist's claims here are
9 contained in the cases that we have cited and including
10 Backlund. And I think where Mr. Everist is getting
11 confused here is this is -- on the one hand, he does have
12 a property right in his mining claim, whatever that means,
13 and when we use that term it can have different meanings
14 in different context. We are not contesting his property
15 right in the minerals that are located on his -- on this
16 unpatented mining claim. We are not contesting. And I
17 think there's no disagreement about the Department of
18 Interior.

19 I will use BLM because they are the ones that
20 really administer the mining laws. It's their
21 jurisdiction to regulate those matters regarding mineral
22 rights. So, for instance, the Forest Service doesn't have
23 any say in, well, who gets an unpatented claim, who has
24 the right to the minerals, how much minerals are they
25 allowed to extract, what someone else's rights might be

1 and so forth.

2 So, for instance, if there was a dispute between
3 Mr. Everist and someone else. So someone else says my
4 claim supercedes yours, and Mr. Everist says no, it
5 doesn't, the BLM might be the folks to go to for that.
6 But the Forest Service -- they don't care. All they care
7 about is the surface resources; what are the trees, the
8 shrubs, who's living on the place, what kind of litter and
9 so forth is on there. So I think that distinction needs
10 to be clear.

11 To Mr. Everist, there's two different functions
12 going on here. That's what the case law recognizes. Even
13 the potential restrictions that are cited in the CFR -- I
14 think it's 228.1 -- those what that really was meant to
15 apply to was look, we are not going to effect necessarily
16 who owns the minerals or who has the right to the
17 minerals, but our cases are very clear that the Forest
18 Service does have the right to regulate the surface use of
19 the land that the minerals -- where the minerals may or
20 may not be located.

21 So having said that, we basically walked your
22 Honor through the authority for these particular statutes
23 we have cited, all the cases. And the reason -- I don't
24 know how I overlooked Backlund in my original memorandum
25 because it was there and had that. For some reason hadn't

1 cited that. But really all Backlund does is reaffirm the
2 Ninth Circuit's position that in these circumstances the
3 Forest Service has the right to regulate the surface use.

4 THE COURT: As I recall, you have a number of
5 cases but seemed like the point you are arguing here you
6 are relying on the Goldfarb --

7 MR. FONG: Goldfield Mines and Doremus. All
8 those cases say the same. Backlund -- and all Backlund
9 does is reaffirm that. I think it's significant it
10 reaffirms that as applies to Defendant's specific case
11 here. I think one of the Defendant's primary arguments is
12 that well, now that I have an unpatented mining claim,
13 that somehow withdraws that piece of property from any
14 regulation whatsoever. And that's not what Backlund and
15 all the progeny of these cases have said. And they are
16 not saying we don't recognize that the Defendant has a
17 property right here, but they are saying despite that,
18 despite the fact that he has an unpatented claim, you
19 know, we still have the -- it's the Forest Service that
20 still has the right to regulate the surface use of what's
21 going on there.

22 I think the Defendant's other argument is that
23 well, the Forest Service has no right to determine what
24 uses are reasonably incident or not incident to mining,
25 and I think that the cases we have cited here certainly

1 are contrary to that. Particularly there's a -- I think
2 U.S. versus Russell which is a District Court case where
3 there's a -- I think it's an F subcite that we have cited
4 here. But that case basically held that if the
5 Defendant's mining operation might cause significant
6 surface disturbance, he must file a Notice of Intent to
7 Operate and required to get a plan of operations going.

8 So this is not a situation where the Defendant
9 has a right to determine well, this particular use is
10 incident to mining so I don't have to get Forest Service
11 approval. Particularly when you look at United States
12 versus Doremus, in that case the Defendant -- that
13 Defendant at least acknowledged that the Forest Service
14 has a right to regulate his mining claim. He came up with
15 a Plan of Operations, and he was basically allowed to dig
16 five trenches. Well, he multiplied that by six and dug 30
17 trenches instead and cut down a whole lot of trees and
18 said well, me cutting down the trees was incident to the
19 mining operation. And the forest -- the Ninth Circuit
20 said no, that's not the case and that -- basically said
21 that you may potentially have that right, but you will
22 still have to get approval to cut down those trees in the
23 first place. The mere fact that your Plan of Operation
24 was silent doesn't absolve you whether or not it's
25 incident to your mining operations.

1 So this idea that the Forest Service has no
2 authority to determine what operations are incident to
3 mining or not is really contradicted by Doremus and the
4 United States versus Russell that we have cited here. I
5 could go on and on but everything is basically laid out in
6 our memorandum.

7 THE COURT: Mr. Butler, do you have anything?

8 MR. BUTLER: No, your Honor.

9 THE COURT: All right. Well, I appreciate your
10 comments. I'm going to go back and look at these
11 memoranda and the cases one more time, the context of your
12 arguments. I know we have trial scheduled for Tuesday so
13 our goal is to get out an order by Friday so you will know
14 where we are at. Thank you, Mr. Everist. Thank you.

15 (Deposition concluded at 10:20 a.m.)

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CERTIFICATE

I, MELANIE J. SAVORD, Certified Shorthand Reporter for the State of Oregon, do hereby certify that I was present at and reported in machine shorthand the oral proceedings had in the above-entitled matter.

I hereby certify that the foregoing is a true and correct transcript, to the best of my skill and ability.

Dated this 13th day of December, 2008.

Melanie J. Savord
CSR Cert. No. 96-0325